Delta Tube & Fabricating Corp. *and* Shopmen's Local Union No. 508, International Association of Bridge, Structural and Ornamental Iron Workers, AFL–CIO. Case 7–CA–37517

May 30, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

On April 17, 1996, Administrative Law Judge Michael O. Miller issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.[2]

The judge found that the Respondent violated Section 8(a)(5) and (1) by unilaterally promulgating a drug and alcohol testing policy without affording the Union an opportunity to bargain over it. We agree with the judge's conclusions for the following reasons, and find, also in agreement with him, that the drug-testing policy promulgated by the Respondent on August 1, 1995, was substantially different from any previously discussed by the parties and that it therefore presented a new occasion for bargaining.[3] The facts, as described in greater detail by the judge, follow.

None of the parties' agreements during their 12-year bargaining history had provided for drug and alcohol testing. In December 1990, during negotiations for the 1991–1994 contract, Shannon, the Respondent's counsel and spokesperson for negotiations, told the Union that the Respondent wanted such a provision. Shannon testified that the Union's negotiator responded that the Union viewed the management-rights clause as reserving to the Respondent the right to implement a shop rule respecting alcohol and drug-testing. Shannon did not document this position in writing, and the Respondent did not then pursue the matter further.

In July 1993, during the term of the 1991–1994 agreement, Shannon sent Union Representative Lyscas a draft policy, stating that he would be willing to meet and discuss it, but that, failing such discussions, the Respondent would implement it in 30 days. Under this policy, employees would be tested after involvement in an accident resulting in an injury or based on reasonable cause, but never on a random basis. Shannon met with the Union 1 month later to discuss the proposal. Union Representative King expressed the view that the Respondent could and should implement the policy as a shop rule before the next negotiations began instead of negotiating it, as employee opposition to such a provision might endanger ratification. Motivated by similar concerns, the Respondent did not implement the policy. In further correspondence between the parties, however, Shannon, in response to union concerns, discussed modifications to the policy. Shannon explicitly noted in writing that he understood the parties' relative positions as being that the Union could grieve "the reasonableness of the policy and the reasonableness of its application, etc.," but that the Union had waived its right to bargain over drug testing itself.

In December 1993, during negotiations for a successor to the 1991–1994 contract, Shannon understood the Union's position, as he expressed it to the Union, as agreeing that testing in the event of injury or reasonable suspicion of use was a management right. Shannon also wrote to Lyscas that he wished to confirm in writing that the Union had chosen not to bargain on the issue. In addition, he stated that the Respondent withdrew its proposal, sought confirmation of the Union's "waiver," and asked that the Union respond immediately if his understanding was incorrect. The Union did not respond. The parties' 1994–1997 agreement does not refer to drug testing.

In October 1994, during the contract's term, the Respondent posted a policy asserting its complete discretion to implement and to determine the procedure for drug testing. The policy provided for testing after an accident resulting in personal injury or when two managers had justifiable reasons for suspicion of use or being under the influence in the workplace, but barred random testing. The Union objected to some aspects of the policy, and the Respondent did not implement it. The Union asserted further, in disagreement with Shannon, that it had not waived bargaining rights over an alcohol and drug-testing policy, and it has since consistently maintained that it wishes to bargain over a drug-testing policy.[4]

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We shall modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

[3] Accordingly, as we are finding that the Respondent implemented a different drug and alcohol-testing policy, we find it unnecessary to pass on the judge's finding that the Union waived its right to bargain over the drug and alcohol testing policy and that waivers in general are unilaterally revocable. Thus, we do not rely on the judge's analysis of the law as relating to waivers of bargaining rights.

[4] Lyscas testified that the Union never agreed that it would not argue that the Respondent had a duty to bargain over the policy itself.

On August 1, 1995, the Respondent sent the Union a policy for posting that day, stating that discussions of it would be a "courtesy" as there was "no flexibility" with it. This policy, "or a more severe one," retained for the Respondent the exclusive discretion to interpret and implement it and precluded grievances. It also provided that, in addition to the grounds for testing named in the October 1994 policy, employees could be tested on a random basis and under various other newly named circumstances. The Union responded that it wished to bargain over the policy and that unilateral implementation would violate Section 8(a)(5). Shannon responded that he would meet concerning the Union's purported waiver of bargaining over the policy. The Union demanded that the Respondent retract the policy; the Respondent has not further implemented or enforced it.

The Respondent contends in its exceptions that the Union's position in negotiations preceding the 1994–1997 contract amounted to a waiver of bargaining rights that privileged the Respondent's unilateral imposition of the nongrievable random drug-testing policy that it announced in August 1995. We disagree, because nothing in the exchanges of views on drug-testing between representatives of the Union and of the Respondent in the years before the 1994–1997 contract started to run could reasonably be construed as an agreement that the Union was giving the Respondent carte blanche on drug testing during the term of the contract. Certainly nothing that was said amounted to a waiver meeting the "clear and unmistakable standard" applied in determining whether a collective-bargaining representative has waived its statutory rights, and if so, to what extent.[5]

As early as November 1993, the parties had discussed the Respondent's authority, and the limitations on it, with respect to a drug-testing policy. Shannon's letter to Lyscas of that date assured the Union the right to grieve the reasonableness of the terms of any drug-testing policy, as well as the reasonableness of its application. This assurance guaranteed the Union a voice in shaping the policy by acknowledging the Union's right to place before an independent arbitrator the issue of whether the content of the Respondent's policy itself was reasonable or whether any particular instance of its implementation was reasonable.

Subsequent correspondence, meetings, and negotiations between the parties reveal no evidence that the Union ever relinquished the right to contest the "reasonableness" of the content or implementation of any drug-testing policy that the Respondent might propose or seek to implement. Nor did the Respondent ever propose that the Union relinquish these rights, either alone or as a quid pro quo for some other benefit.

[5] *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983).

The policy posted on August 1, 1995, and which is the subject of the complaint, however, failed to comply with Shannon's assurances to the Union, as set forth in his November 1993 letter to Lyscas. By reserving to the Respondent sole discretion to interpret and implement the policy, the new policy directly contradicted Shannon's guarantee of the right to grieve the reasonableness of the policy's content or application.

In addition, the Respondent's August 1995 policy provides, among other things, for random testing of employees based on the Respondent's "sole discretion." The record shows that the Union had consistently opposed a random testing policy. More importantly, in July 1993, when the Respondent argues that the Union waived its right to bargain over the drug-testing policy, and again in October 1994, the Respondent explicitly repudiated random testing of employees.

Alcohol and drug testing at the discretion of an employer is a mandatory subject of bargaining. *Johnson-Bateman Co.*, 295 NLRB 180 (1989). It is also, without doubt, a distinctly different condition of employment from testing after an accident causing physical injury or on reasonable suspicion. Thus, the inclusion of random testing in the August 1995 posting, even taken alone, fundamentally alters the nature of the policy and its effect on employees.

Finally, the August 1995 policy's section IX, "Review Rights," provides that "[t]he Company retains its right and its management prerogative to change and/or discontinue this Policy and/or any of its provisions at any time." In view of Shannon's earlier statement of the Respondent's position that, although he viewed the Union as waiving the right to bargain over imposition of a drug policy, the Union could grieve the reasonableness of the policy's terms or implementation, this provision demonstrates decisively that the August 1995 drug-testing policy was not the one the parties discussed in 1993 or 1994. Thus, it was not the policy on which any understanding as to the Respondent's right of unilateral implementation could have been based.

Thus, the record demonstrates that by announcing the August 1995 policy, the Respondent in effect used the Union's purported waiver of the right to bargain over management's imposition of a clearly detailed and limited set of guidelines to justify its unilateral implementation of quite another policy, the terms of which were, in virtually every significant provision, different from those in the original policy. These differences were so fundamental that, accepting for the sake of argument that Shannon's November 18, 1993 letter correctly memorialized the parties' agreement, no waiver of bargaining made in 1993 or 1994 could extend to the August 1995 posting. Thus, in August 1995, the Respondent announced a new policy, creat-

ing a wholly new occasion for bargaining over a mandatory subject, and the Respondent was obligated to timely inform the Union and to bargain with it on request over the policy. *NLRB v. Litton Business Systems*, 895 F.2d 1128 (9th Cir. 1990). Accordingly, we find that the Respondent's unilateral posting of its drug-testing policy on August 1, 1995, violated Section 8(a)(5) and (1) of the Act.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Delta Tube & Fabricating Corp., Holly, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(c).

"(c) Within 14 days after service by the Region, post at its Holly, Michigan facility copies of the attached notice marked 'Appendix.'[19] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 1, 1995."

2. Substitute the following for paragraph 2(d).

"(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply."

3. Substitute the attached notice for that of the administrative law judge.

MEMBER HIGGINS, concurring.

I agree with the conclusion of my colleagues that the Respondent violated Section 8(a)(5) by unilaterally implementing a drug policy that differed substantially and fundamentally from that which it had discussed with the Union on a number of occasions between 1990 and 1995. In my view, the Union clearly waived its right to bargain about a policy that permitted testing in the event of injury or based on reasonable suspicion of use, and that permitted grievances for particular applications. Further, that waiver, once given, continued during the life of the collective-bargaining agreement. However, that waiver did not cover random testing or the absence of grievability. Indeed, in July 1993 the Respondent's draft policy provided for no random testing, and correspondence from the Respondent clearly stated that the Union's position was that the Union be able to grieve "the reasonableness of the policy and the reasonableness of its application."

Although there was disagreement as to the extent of this waiver in December 1993 and October 1994, it is clear that, in presenting its then-understanding of the Union's position, the Respondent consistently eschewed the notion that random testing was part of its proposals. As random testing is a crucial issue, its inclusion in Respondent's unilaterally implemented plan was significant and unlawful. Similarly, as the Union never waived the right to grieve, Respondent's unilateral plan, which took away that right, was violative of the Act.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT unilaterally promulgate or implement any drug and alcohol testing policy without offering to bargain with the Union concerning the policy.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL revoke the alcohol and drug-testing policy which we promulgated on August 1, 1995, and WE WILL revoke any warnings or discipline given to any employees pursuant to that policy.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any references to our drug policy and any resulting warnings or discipline and WE WILL, within 3 days thereafter, notify those employees listed in those files for warnings or discipline that this has been done and that the warnings and discipline will not be used against those employees in any way.

DELTA TUBE & FABRICATING CORP.

Andre F. Mays, Esq., for the General Counsel.
Thomas H. Williams, Esq. (Jaffe, Raitt, Heuer & Weiss), for the Respondent.
Richard P. James, Esq. (Allotta & Farley), for the Charging Party.

DECISION

STATEMENT OF THE CASE

MICHAEL O. MILLER, Administrative Law Judge. This case was tried in Detroit, Michigan, on February 27, 1996, based on a charge filed on August 3, 1995, as amended, by Shopmen's Local Union No. 508, International Association of Bridge, Structural and Ornamental Iron Workers, AFL–CIO (the Union or Local 508) and a complaint issued on September 29, 1995, by the Regional Director of Region 7 of the National Labor Relations Board. That complaint alleges that Delta Tube & Fabricating Corporation (Respondent or the Employer) violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act) by announcing its intention to implement an alcohol and drug testing policy without notice to the Union and by failing and refusing to bargain with the Union with respect to that policy notwithstanding that it is a mandatory subject for the purpose of collective bargaining. Respondent's timely filed answer denies the commission of any unfair labor practices and affirmatively asserts that the Union waived its right to bargain over that subject.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation with an office and place of business in Holly, Michigan, is engaged in the manufacture of specialized production racks. In the calendar year ending December 31, 1994, in the course of its business operations, it sold and shipped from its Holly, Michigan facility goods valued in excess of $50,000 directly to points outside the State of Michigan. The complaint alleges, Respondent does not contest, and I find and conclude that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. UNFAIR LABOR PRACTICES

A. *Background*

Respondent produces racks used by automobile manufacturers in the assembly of cars and trucks. Its production and maintenance employees have been represented by Local 508 for at least 12 years.[1]

At issue here is whether the Union, before and during the course of bargaining for the 1994–1997 collective-bargaining agreement, waived its right to bargain over the establishment, terms and implementation of an alcohol and drug-testing policy. Participating in that bargaining were Joseph Lyscas, Local 508's business agent; Randy Clark, chief union steward; Howard Todd Campbell, the Employer's vice president for operations; and Joseph Shannon, the Employer's counsel. Lyscas and Shannon were the principal negotiators and spokesmen. Also involved on the Union's behalf at earlier stages were George Clark and James King, International Union representatives and administrators of Local 508.

The parties' collective-bargaining agreements, through the current contract, are silent on the question of drug and alcohol testing. The current contract contains a "Management Prerogatives—Shop Rules" article, section 6, which provides, inter alia:

> (A) The Company reserves the rights, privileges, power and authority, which it possessed prior to having entered into contractual relations with the Union, except those expressly and specifically abridged or modified by this contract.
>
> (B) The Company shall have the right to establish, maintain and enforce reasonable rules and regulations to assure orderly plant operations.[2]

B. *Discussions Before the 1993–1994 Contract Negotiations*

The Company first raised the issue of drug testing in December 1990, during negotiations for the 1991–1994 contract. When the issue was placed on the table, the Union was told that there were both significant safety issues, stemming from the nature of the equipment in the close confines of the plant, and obligations to the big three automobile manufacturers, mandating the adoption of such a policy. The Union objected to the policy but did not dispute Respondent's belief that there was a high incidence of drug use in the plant. According to Shannon's uncontradicted testimony, the Union's spokesman at that time, George Clark, took the position that the Company had the right to implement such a policy under the shop rules provision of its management prerogatives article. Respondent had nothing in writing to document that concession, however, and took no further action on its proposal.

On July 12, 1993,[3] Shannon sent Lyscas a proposed drug-testing policy with a covering letter stating:

> In the past, Dick Clark [Respondent's general manager] and I have made efforts to discuss with your local . . . implementation of a drug testing policy. Unfortunately, our efforts to get a discussion have been unsuccessful.Therefore I am enclosing a copy of a policy which we have drafted. We are happy to meet and discuss it with you and/or take your suggestions in any form with which you feel most comfortable. However, if you fail to provide input, we will implement the policy 30 days from today.

That letter was misaddressed and Lyscas did not receive it until August 5. The attached proposed policy provided for drug testing after a personal injury accident or upon reasonable cause. It prohibited random testing.

At some point during August, a meeting to discuss that proposal was held in Shannon's office. Shannon claimed that King initiated the meeting. Lyscas and James King attended for the Union; Shannon and King did all the talking as Lyscas was new to his position. In that meeting, Shannon said, King made clear the Union's belief that Respondent had

[1] In its unfair labor practice charges, the Union alleged that there were 250 unit employees.

[2] It appears that this language is unchanged from the prior agreement.

[3] Until otherwise stated, all dates hereinafter are between July 1993 and January 1994.

the right to implement the policy as a shop rule and expressed a desire that Respondent simply adopt the policy, preferably before the start of negotiations. If the policy was negotiated, King said, it would cause 15 or 20 percent of the employees to vote against any contract presented for ratification.[4] Respondent took no action at that time, however, because of a similar fear of an adverse reaction by unit employees.

After the meeting, on instructions from King, Lyscas faxed Shannon a copy of an alcohol and drug-testing policy from another company, noting that "[t]his is the other policy we discussed for Delta Tube." Like the Employer's proposal, it prohibited random testing and set forth an injury or reasonable suspicion as the basis for any tests. Shannon responded on November 18, stating, inter alia:

> First, I am sensitive to your difficult predicament of bargaining versus implementation. In that regard, I am willing to accept your input (which I want) on an off-the-record basis. Implicit in my agreement, and I hope in your request, is the notion that while you may grieve the reasonableness of the policy, and the reasonableness of its application, etc., you will not argue that Delta had a duty to bargain over the Policy, which it ignored. Although you were not present in the last negotiations, I believe the Union waived its right to bargain over the drug test. George Clark told me, off the record, that although he was not against drug-testing, he would not be able to agree to it in any form and that implementation was the only alternative.

That letter went on to discuss various modifications of the drug-testing policy made in response to union concerns, including a change from "reasonable suspicion" to "justifiable reasons for suspicion." It solicited the Union's additional suggestions and comments. The Union did not respond to that letter and there was no further discussion until the opening of negotiations. Lyscas testified, however, that there was never any agreement that the Union would not argue that Delta had a duty to bargain over the policy.

C. *The Negotiations*

The first substantive meeting toward a new contract was held on December 14. At that time, the Union presented its demands; it made no proposal on drug testing. The Employer's counterproposals, as described in Campbell's notes, sought "random drug testing: reasonable cause implementation." There was, Shannon recalled, some discussion of an employee possibly testing positive, without having used drugs, as a result of exposure to secondhand smoke. In the course of the discussion of the Employer's drug-testing proposal, he said, Lyscas told him to "Get off of it," expressly recognizing the Employer's right to implement the policy as a shop rule and requesting that it do so. Shannon's notes state, "Section 6. Waiver (Joe wants shop rule)." Similarly, Respondent's "Offer and Status Sheet as of December 14," which was faxed to the Union at some point after this meeting, notes, "Union agrees that the implementation of [drug-testing] program in the event of injury or reasonable suspicion of use is within the Company's retained management rights."[5]

The meeting of December 22 was essentially a replay of the December 14 meeting in regard to the drug-testing issue. The Union made no proposal on that issue, the Employer raised it and Lyscas reiterated that it was the Company's prerogative to adopt and implement a policy, that it should be in the form of a shop rule and that, if it was included in the contract, ratification would be in jeopardy. Shannon asked him, expressly, "You understand that you're waiving?" and Lyscas said "Yes." Shannon recorded a note stating, "drug-testing will be a shop rule."

Shannon also told Lyscas, in a brief hallway discussion, that he was going to confirm the Union's waiver in writing. He did so on December 28. In that letter, he reiterated that the Employer had made a proposal on drug screening, that the Union had stated that bargaining was not required inasmuch as the Employer had a right to implement the policy under either the existing or the proposed management's prerogative article and that the Union elected not to bargain on that issue. He therefore withdrew Respondent's demand to bargain on implementation of a drug policy and sought confirmation of the Union's waiver, asking for an immediate reply if this did not correctly reflect the parties' understanding. The Union did not respond.[6]

There was no further discussion of the drug-testing policy during the negotiations. In early February, after a month long strike, the parties reached an agreement which did not refer to drug testing.

D. *Attempted Implementation*

Respondent took no action to adopt or implement a drug-testing policy until October 1994. At that time, the Employer posted a "Drug or Alcohol Use or Abuse Testing" policy, essentially consistent with what Respondent had proposed in the fall of 1993. It stated that the Company had the "complete and exclusive discretion to implement" that policy for applicants and employees and to determine the method and procedure for such testing. It also provided that employees would be subject to testing following a personal injury accident or when two management representatives "observe justifiable reasons for suspicion" of drug use or abuse in the

[4] Lyscas had little recollection of the meeting. King did not testify.

[5] Lyscas denied that he told the Employer that it should implement its policy subject to discussion on whether it was reasonable. He claimed that, while he recognized that this would not be a good time to raise the issue because it might provoke a strike, he was willing to negotiate on it. He further claimed that, because of the potential for opposition by unit members, Respondent dropped the issue. I credit Shannon, noting both their relative demeanors and Respondent's written record of the discussions. The testimony of Chief Union Steward Randy Clark adds little to this discussion; Randy Clark heard no discussion of drug testing during these negotiations, contrary to the testimony of Lyscas, Shannon, and Campbell.

[6] Here, too, I credit Shannon's testimony, as corroborated by Campbell and his notes, over Lyscas' denial that there was any discussion of drug testing at the December 22 meeting or any hallway discussion of waiver. Lyscas contended that he did not see Shannon's December 28 letter until November 1984 because it had been sent to the Union's Dearborn Heights office at a time when Lyscas was staying at a motel near the plant in Holly, Michigan. I note Lyscas' acknowledgment that agents in the union hall routinely opened each other's business mail. Even if it did not reach Lyscas, that letter came to the attention of the Union.

workplace or that an employee is under the influence while in the workplace. It further provided that refusal to submit to testing would be treated as a voluntary quit. Random testing of employees was precluded.

Lyscas was notified of the posting and called Dick Clark, Respondent's general manager. Both Lyscas and Clark referred the matter to the parties' respective counsels and Clark told Lyscas that the policy would not be implemented.[7] The Union's attorney, Richard James, then sent Shannon proposed drug-testing language. Shannon responded on November 8, 1994, sending James a copy of his December 28, 1993 letter to Lyscas. He noted that Lyscas had not objected to its contents "and repeatedly told me that the Union wished to waive its right to bargain regarding drug-testing." He agreed to respond to James' "suggestions with respect to the drug-testing policy" while "not agreeing to bargain over" that policy.

On December 1, 1994, James replied:

> When we discussed the matter with Joe Lyscas, he disagrees with your opinion the Union elected not to bargain over the Drug Policy. Instead, Joe Lyscas and Local 508 have not and do not waive their right to negotiate and bargain over the implementation of the Drug Policy at Delta Tube.

On December 20, Shannon disputed James' assertion and requested that the Union "clarify [its] position and the basis of that position." He stated Respondent's intention to implement the policy right after the first of the year and asked for a quick response. James' January 4, 1995[8] reply again asserted that Lyscas never waived the Local's bargaining rights and demanded bargaining over "any drug-testing policy which Delta may consider implementing."

In his January 11 letter, Shannon insisted that James set out the basis for his claim that there had been no waiver. James responded to the effect that Lyscas disagreed with Shannon's opinion of what he had agreed to. The demand to bargain prior to any implementation was reiterated.

At hearing, Shannon acknowledged that the Union's position, since October 1994, has been that it wished to bargain over any drug policy which Respondent sought to implement.

Nothing further happened with regard to a drug-testing policy until about August 1. On that date, after a phone conversation, Clark faxed Lyscas "a copy of Drug Policy which we are posting today, 8–1–95." He stated in the fax cover sheet, "I would like to discuss this with you as a courtesy as I don't see any flexibility with it." The policy stated that it, "or an even stronger version," applied to all employees. It further provided that the Company retained "the exclusive discretion to interpret and implement this Policy." Within that policy, in addition to what had been stated as grounds for testing in the October 1994 proposed policy, were provisions for random testing and testing before an employee was allowed to use heavy equipment, trucks or forklifts, or after involvement in any accident.

Lyscas called Clark as soon as he received this fax. Clark said he would contact Shannon. On August 1, Lyscas wrote Clark. He referred to the phone conversation of July 31 in which Clark had "requested the implementation of a Drug Policy" and offered to meet after August 10. He also reiterated the Union's position that it wanted to bargain over the policy and asserted that Respondent's unilateral implementation would violate Section 8(a)(5).

Shannon responded on August 4. In his letter, he claimed to have taken offense at an alleged implication in Lyscas' letter that he was unwilling to meet (an implication I do not find). He reasserted that he had requested the Union's counsel to reveal its information indicating that the Union had not waived its right to bargain and disputed that any such information existed. He then indicated a willingness to meet "for the purpose of discussing the waiver issue" but "not to bargain over the existence of, or the terms of, a drug-testing policy." Shannon suggested that such a meeting would be beneficial and that "the parties ought to share their positions prior to any legal action."

The final piece of correspondence is Lyscas' reply of August 10. In that letter, he asserted that Respondent's unilateral implementation and its refusal to bargain in good faith undermined the Local's ability to function effectively as bargaining representative. He demanded retraction of the implementation and removal of all communications to employees respecting it. Lyscas received no response to this letter; however, Respondent has taken no steps to further implement or enforce the policy.

E. *Analysis*

The key legal principles are clear. First, drug-testing of employees is a mandatory subject of bargaining upon which a union has the right to bargain. *Kysor Industrial Corp.*, 307 NLRB 598 (1992); *Johnson-Bateman Co.*, 295 NLRB 180 (1989). Second, a waiver of that bargaining right must be clear and unmistakable. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983). Management-rights language which merely reserves to the employer the authority to prepare and enforce reasonable rules does not rise to the level of a clear and unmistakable waiver of the right to bargain over a specific proposal for drug testing. *Southern California Edison Co.*, 310 NLRB 1229, 1230 (1993); *Johnson-Bateman*, supra.

Respondent's management prerogatives and shop rules article, giving it authority to adopt and enforce "reasonable rules and regulations to assure orderly plant operations" is the equivalent of the management-rights clauses in the above-cited cases.[9] Thus, if a waiver is to be found here, it must be found in the parties' communications; it cannot be inferred from the contract.

I am convinced that, through the conclusion of the 1993–1994 contract negotiations, the Union had expressly waived its right to bargain over the implementation of a drug-testing policy. It preferred that the Employer take responsibility for the policy. It further appears that neither party was willing to directly confront the minority of employees who would take offense at such a policy. Notwithstanding what I find to have been a waiver clearly expressed at that time, the Em-

[7] Lyscas' testimony to this effect was credibly offered and stands uncontradicted.

[8] All dates hereinafter are 1995 unless otherwise specified.

[9] The language in *Southern California Edison* provided that "The Company reserves the right to draft reasonable safety rules . . . and to insist on the observance of such rules." In *Johnson-Bateman*, it provided that management reserved the right to "issue, enforce and change Company rules."

ployer failed, until at least October 1994, to act on the drug-testing policy.[10]

In October 1994, when Respondent sought to adopt a drug-testing policy, it immediately became evident that the Union was no longer willing to waive its right and now desired to bargain. Respondent disputed the Union's right to change its position but dropped, at least for the time being, its efforts toward adoption and implementation.[11] The Union's correspondence in the months that followed made clear its position that it was entitled to bargain over the implementation of any drug-testing policy. Respondent did not renew its efforts toward implementation until August 1995. At that time, the Union again made clear its present insistence on bargaining and again Respondent relied on the Union's earlier waiver. The question thus presented is whether a waiver, once made, may be revoked?

I have found no case law directly on point. However, the reluctance of the Board and the courts to find a waiver of a statutory right suggests an affirmative answer to that question. I draw that implication from the Supreme Court's requirement, expressed in *Metropolitan Edison*, supra, that any waiver of a statutory right be "explicitly stated" and "clearly and unmistakably" expressed. It is implicit in the Board's insistence that "a waiver of bargaining rights under Section 8(a)(5) not be lightly inferred." *Colorado-Ute Electric Assn.*, 295 NLRB 607, 609 (1989), citing *Park-Ohio Industries*, 257 NLRB 413, 414 (1981), enfd. 702 F.2d 624 (6th Cir. 1983). It is also implicit from the Board's approach to allegations of waiver arising from a union's prior acquiescence in related unilateral action.

Thus, in *Owens-Brockway Plastics Products*, 311 NLRB 519 (1993), the employer contended that the union had waived its right to bargain over a decision to close a plant and relocate the work which had been performed there. With respect to the contention that such a waiver was inferable from the union's failure to object to earlier transfers of work from that plant, the Board stated:

> [W]ith respect to the Union's alleged failure to request bargaining over prior work transfers, the Board has held that "[a] union's acquiescence in previous unilateral changes does not operate as a waiver of its right to bargain over such changes for all time." *Owens-Corning Fiberglass*, 282 NLRB 609 (1987); *Dubuque Packing*, [303 NLRB 383, 397 (1991).][12]

Similarly, in *Equitable Gas Co.*, 303 NLRB 925, 930 (1991), the employer unilaterally implemented appearance guidelines. The Board concluded that the union's past acquiescence in unilateral implementation of particular work rules or other unilateral changes "does not operate as a waiver of its right to bargain over such changes for all time."[13]

Prior to implementation of the appearance guidelines in *Equitable Gas*, the union's representatives had "acknowledged that Respondent has the right to impose 'reasonable' disciplinary rules," including "reasonable rules to try and improve their image with the public." The Board, rejecting the conclusions of the administrative law judge, found that the union had not, by that concession, waived its right to bargain over the appearance guidelines. The Board noted further that, despite the union representatives' recognition of the employer's need to implement reasonable rules, the union retained the right "to challenge the appearance guidelines on the basis that they were in whole or in part unreasonable work rules." It therefore concluded that no clear and unmistakable waiver of the right to bargain over those guidelines had been established.

While it is true that the technical rules of contract law are not entirely applicable in the realm of collective bargaining,[14] those rules do provide guidance for questions such as this. I believe that the Union's waiver may be likened to an offer. Like an offer in the collective-bargaining context, it remains on the "table until it is explicitly withdrawn by the offeror or unless circumstances arise that would lead the parties to believe that the offer has been withdrawn."[15] Here, both the Union's immediate protestations and demands to bargain made clear to all participants that the waiver had been withdrawn. No policy was in effect after the waiver's withdrawal became apparent and Respondent could not, thereafter, rely on that waiver to justify unilateral implementation of the drug-testing policy.[16]

Based upon the foregoing, I conclude that a party's waiver of a statutory right is revocable. I further find that the Union's waiver, expressed up through December 1993, was effectively revoked in October 1994.[17] Accordingly, I find that by unilaterally promulgating an alcohol and drug-testing policy on August 1, 1995, expressly refusing to bargain

[10] There may have been other factors involved in the delay, including management's indecision over the exact scope of such a policy.

[11] Contrary to Respondent's assertion, the evidence does not establish that a drug policy was "implemented" in October 1994 and "revised" on August 1, 1995. The implementation proposed in October was withdrawn on receipt of the Union's objections. Shannon's December 20, 1994 letter, stating Respondent's future intention "to implement its drug-testing policy right after the first of the year," supports that conclusion. Respondent's efforts to implement a new and different policy in 1995 was separate and distinct from the October 1994 action.

[12] The Board also rejected the contention that a waiver was inferable from the management-rights clause which reserved to the employer the "right to increase or decrease production . . . remove or install machinery and increase or change production equipment, introduce new and improved productive methods and facilities, [and] relieve employees from duty because of lack of work."

[13] See also *NLRB v. Miller Brewing Co.*, 408 F.2d 12, 15 (9th Cir. 1969), in which the court, under similar circumstances, stated, "[It] is not true that a right once waived under the Act is lost forever."

[14] See *Transit Service Corp.*, 312 NLRB 477, 481 (1993), and cases cited there.

[15] *Sunol Valley Golf Club*, 310 NLRB 357 fn. 2, enfd. 48 F.3d 444 (9th Cir. 1995), quoting *Hydrologics, Inc.*, 293 NLRB 1060, 1063 (1989).

[16] Viewed thusly, it appears that Respondent would have been entitled to insist on maintenance of the October 1994 implementation (i.e., its acceptance of the Union's then outstanding waiver offer) as the Union had not, prior to that implementation, withdrawn its waiver. As noted, however, it chose not to do so and withdrew the policy which it had posted at that time. It was at that point in time that the Union withdrew its waiver.

[17] I would be inclined to reach a contrary conclusion if the evidence indicated that Respondent had either provided a quid pro quo for that waiver or had acted to its prejudice in reliance on it. Neither appears to be the case here. See *Pacific Coast Assn. of Pulp & Paper Mfrs. v. NLRB*, 304 F.2d 760, 765 (9th Cir. 1962).

thereon, Respondent has failed and refused to bargain in good faith, in violation of Section 8(a)(5).

In his November 18, 1993 letter, Shannon had noted that, "[i]mplicit in my agreement , and I hope in your request, is the notion that . . . you may grieve the reasonableness of the policy and . . . its application." The policy which Respondent promulgated on August 1, 1995, appears to negate the effectiveness of that proffered grievance right. It would permit the Employer to impose that policy "or an even stronger version" and retained to the Employer "the exclusive discretion to interpret and implement" that policy. It also gave the Employer "exclusive discretion in determining the method and procedure of any such testing" at least for "applicants." Such language would render the grievance procedure essentially nugatory. Moreover, that policy was more stringent than that which it had earlier proposed in that it provided for random testing. As noted supra, Respondent's December 14, 1994 "Offer and Status Sheet" had reflected only a union agreement to "the implementation of [a] program in the event of injury or reasonable suspicion of use" and the policy which had been proposed in October 1994 went no further than that.

Thus, even if the Union had not effectively revoked its waiver, I would find Respondent's 1995 policy to be contrary to the earlier understanding of the parties and therefore subject to bargaining.

CONCLUSION OF LAW

By unilaterally promulgating an alcohol and drug-testing policy, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Specifically, Respondent shall be ordered to bargain with the Union over any alcohol and drug-testing policy which it seeks to promulgate or implement. Further, it shall be ordered to revoke the alcohol and drug-testing policy, which it promulgated on August 1, 1995, and to revoke any warnings or discipline given to any employees pursuant to that policy, removing any references to such warnings or discipline from the employees' files and notifying them that it has done so.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[18]

ORDER

The Respondent, Delta Tube & Fabricating Corp., Holly, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally promulgating or implementing any alcohol and drug-testing policy without offering to bargain with the Union concerning the policy.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union over any alcohol and drug-testing policy, which it seeks to promulgate and/or implement.

(b) Revoke the alcohol and drug-testing policy, which it promulgated on August 1, 1995, and revoke any warnings or discipline given to any employees pursuant to that policy, removing any references to such warnings or discipline from the employees' files and notifying them that it has done so.

(c) Post at its facility in Holly, Michigan, copies of the attached notice marked "Appendix."[19] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

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[18] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[19] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."